Lin R. Rogers Electrical Contractors, Inc. ***and*** **International Brotherhood of Electrical Workers, Local Unions 59 and 116, AFL–CIO.** Cases 16–CA–17563 and 16–CA–17563–2

August 6, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On June 11, 1996, Administrative Law Judge Philip P. McCleod issued the attached bench decision. The Respondent filed exceptions and a brief in support, and the General Counsel filed cross-exceptions and a supporting and answering brief which the Charging Parties adopted.[1] The Respondent thereafter filed an answering and reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, and to adopt the recommended Order as modified[3] and set forth in full below.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act when it refused to hire six Union applicants at its Lewisville, Texas jobsite, and terminated employee Roger Grizzle, an employee who revealed his intent to organize after he was hired and who was terminated on the day he joined a union picketline. We agree with those findings for the reasons set forth in the judge's bench decision, as explained in the summary of credited testimony below. In addition, as explained below, we find merit to the General Counsel's exception that the judge erred in failing to find that the Respondent committed a violation of Section 8(a)(1) of the Act through a statement which the judge found was made by Diane Coger, whom the judge found to be an agent of the Respondent.

Summary of the judge's factual findings

The Respondent was the electrical contractor at a Home Depot construction site in Lewisville. The Respondent's operation at the site was set up in June 1995[4] by its foreman, Doug Coger, and his wife, Diane Coger, who was responsible for advertising and dealing with temporary help agencies to secure electricians for the project. On June 19, Diane Coger placed an employment ad in the *Dallas Morning News*, seeking electricians and helpers; the ad ran from early July to July 14.

On July 3, union member Donald Attaway, a journeyman electrician with 18 years' experience who was currently unemployed, applied in person at the site and took a brief test administered by Doug Coger. Coger asked Attaway if he knew of any helpers whom Coger could hire and said he would be needing 10 to 15 journeymen. Attaway then asked if it would be a union job and if the Respondent would consider signing a union contract. Coger told him the Respondent had decided not to use union labor. Attaway was never hired by the Respondent.[5]

On July 6, in response to the ad, Leonard Lynch, an experienced journeymen electrician who had worked as a Local 59 organizer during the previous 2 years, and two other experienced journeymen, union member Jim Mattson, and Marty Burleson, an organizer from Local 116, came to the Respondent's construction trailer at Lewisville. Mattson, who entered the trailer first, was allowed to fill out an application, and he indicated on it that he was a member and employee of Local 59. Lynch and Burleson were told that they should make appointments to apply later, although Coger told Lynch that he needed seven to eight journeymen right away. Coger declined the request of Lynch and Burleson to sign a contract with Local 59, saying that the Respondent had decided to do this project with nonunion labor. When Coger suggested that union members would not work for the wages the Respondent was paying, Lynch and Burleson assured him members would. When Lynch later returned on July 10 and filled out an application, Diane Coger told him that Doug Coger was not there and Lynch would have to return later to take a test. Burleson contacted the jobsite by telephone that same day and was told by Diane Coger that the Respondent was no longer accepting applications. Mattson, Burleson, and Lynch were never hired.

Electricians Hershal Dunagan and Randy Ballantine, who had 10 and 25 years' experience, respectively, were unemployed when they sought jobs with the Respondent on July 7. They wore union insignia, but Dunagan made it clear that they were willing to work for $12 an hour,

[1] Local Unions 59 and 116 are referred to collectively as "the Union."

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Consistent with *Dean General Contractors, Inc.*, 285 NLRB 573 (1987), we agree with the judge that offers of employment and reinstatement and the payment of backpay are appropriate remedies for the Respondent's discrimination, and we leave to the compliance stage of these proceedings the determination how long each of the discriminatees would have been employed at the Lewisville jobsite and subsequent sites, if any. We will also modify the recommended Order to conform to our additional findings herein and to the Board's decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] All dates hereafter are in 1995 unless otherwise stated.

[5] The Respondent has clearly abandoned its defense, discredited by the judge, that Attaway was not hired because he performed poorly on the test.

the wage the Respondent was offering. Both filled out applications[6] and were told they would be called back for interviews and tests. The Respondent failed to contact either of them.

Union member Roger Grizzle, an unemployed journeyman electrician who did not identify himself as a union organizer or wear any union insignia, also applied for a job on July 6, and after he took the test, was hired. He began working on July 10. Not long thereafter, in mid-July, when he was in the trailer alone, he heard an incoming telephone message from Western Staff Services inquiring about "the qualifications" desired for "the 10 electricians" that the Respondent needed. Later that month, after Leonard Lynch had applied for work with the Respondent through Western Staff Services, Diane Coger reported to Doug Coger, in Grizzle's presence, that she had told Susan Terry, manager of the local office of Western Staff Services, that the Respondent "can't use" Lynch because "he's union."

Between July 10 and August 7, the Respondent hired seven electricians for the Lewisville site, and it hired 11 more from August 29 to November 1, most, if not all, from other projects of the Respondent in other States.

On August 14, the Union set up a picket line at the Lewisville site. Grizzle told Doug Coger that he was leaving the site because he wanted to honor the union picket line. Coger told Grizzle that if he left, he would be treated as having quit. Later that day when Grizzle came back and offered to return to work the next day, Coger informed him that he had been terminated.

Analysis

The Respondent concedes that on the basis of the credited evidence, the General Counsel has satisfied his *Wright Line*[7] burden of showing that antiunion animus was a motivating factor in its refusal to hire the six union applicants. It contends that it should escape liability because it proved its *Wright Line* defense, i.e., that it would not have hired those applicants even in the absence of their protected activities because it was following a lawful policy of filling positions by transferring its employees from other jobsites on which work had finished. The Respondent points to testimony of its witnesses about such a policy and a paragraph in its employee handbook stating that applications would be required to be submitted through its national office in Marietta, Georgia, whenever possible, and that "[W]ork will be assigned to existing employees rather than hiring new employees."

We agree with the judge's rejection of this defense. The judge acknowledged that the Respondent had transferred employees from other sites; but, as he noted, the Respondent had shown every intention of hiring locally for the Lewisville site until it appeared that a number of Union members and organizers were applying. The judge cited ample evidence for his conclusion concerning the Respondent's evident change in plans. The Respondent's agent, Doug Coger, had initially indicated to employee Attaway on July 3 that he was looking to hire 10 to 15 journeyman electricians, and he did not suggest that such employees were transferring from other sites. The Respondent began telling the Union applicants that it was not taking applications on July 10, by which time all six self-identified Union members had applied. Yet the Respondent's local ad seeking journeyman electricians continued to run 4 days after that date, and Grizzle's testimony regarding the telephone message from Western Staff Services revealed that even after July 10, the Respondent was still seeking to hire through that agency. Furthermore, in mid- to late July, when Diane Coger, overheard by Grizzle, told her husband about her response to Western Staff Services' report of Lynch's application, she did not report telling Western Staff Services that the Respondent didn't need electricians, because it was getting them from other sites. She said Lynch should not be sent out for an interview because he was "union."[8]

In addition to adopting the judge's finding of the unlawful refusals to hire, we also agree with the judge, for the reasons stated by him, that Grizzle was unlawfully terminated when he made an offer to return to work after honoring the picket line. An employee can be permanently replaced for honoring a picket line or otherwise engaging in an economic strike, but he or she may not lawfully be discharged for that reason. *NLRB v. International Van Lines*, 409 U.S. 48, 52–53 (1972). Grizzle was clearly discharged for walking out in support of the picket line, as Doug Coger made clear when Grizzle first announced his intent to honor the picket line.

We find, however, that the judge erred in failing to find that Diane Coger's statement to Doug Coger, in the presence of employee Grizzle, that she had told the

[6] The Respondent asserted that it failed to find a copy of Dunagan's application in its files, but the judge credited Dunagan, corroborated by Ballantine, that he had completed the application and turned it in.

[7] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

[8] We also reject the Respondent's defense as to Burleson and Dunagan that they had failed to file applications. As noted above, the evidence credited by the judge shows that Dunagan did file an application and that Burleson sought to do so but was told by telephone on July 10 that the Respondent would not accept any. There is similarly no merit to the Respondent's contention that it would not have hired Lynch in any event because he had not worked in the trade for the previous 2 years, while he was working as a union organizer, and obviously had no interest in returning to electrical work. Lynch was a journeyman electrician with more than 20 years of experience who duly filled out an application for employment, and his organizer status cannot be used for deeming him other than a bona fide applicant. *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995). We also note that in September 1995, just 2 months after his unsuccessful attempt to get himself hired on Respondent's project, Lynch obtained work as a journeyman electrician on construction jobs with other employers. This evidence belies Respondent's claim that Lynch was not in fact interested in working as an electrician.

Western Staff Services manager that the Respondent could not "use" Lynch because he was "union," unlawfully indicated that the Respondent would refuse to hire applicants who were "union." Such a statement is clearly coercive and violates Section 8(a)(1) of the Act. See *Quality Control Electric, Inc.*, 323 NLRB 238 (1997).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, Lin R. Rogers Electrical Contractors, Inc., Lewisville, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that union applicants will be refused employment.

(b) Failing and refusing to hire applicants who reveal their actual or probable union affiliation on their job publications.

(c) Discharging employees because of their protected union activity.

(d) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Don Attaway, Randy Ballantine, Marty Burleson, Hershel Dean Dunagan, Leonard Lynch, and Jim Matteson employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against.

(b) Within 14 days from the date of this Order, offer Roger Grizzle full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make whole Don Attaway, Randy Ballantine, Marty Burleson, Hershel Dean Dunagan, Leonard Lynch, Jim Matteson, and Roger Grizzle for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them by paying them a sum of money equal to the amount they would have earned from the date of the discrimination against them to the date of the Respondent's offer of employment, less net interim earnings, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Roger Grizzle, and the refusals to hire Don Attaway, Randy Ballantine, Marty Burleson, Hershel Dean Dunagan, Leonard Lynch, and Jim Matteson, and within 3 days thereafter notify them in writing that this has been done and that the discharge and refusals to hire will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Duplicate and mail to all employees who were on the payroll at the Respondent's Lewisville, Texas project which is the subject of this case copies of the attached notice marked "Appendix A."[9] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's duly authorized representative, shall be duplicated and mailed at the Respondent's expense, and within 14 days after service by the Region.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not specifically found.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees that union applicants will be refused employment.

WE WILL NOT fail and refuse to hire applicants who reveal their actual or probable union affiliation on their job applications.

WE WILL NOT discharge employees because of their protected union activity.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order offer Don Attaway, Randy Ballantine, Marty Burleson, Hershel Dean Dunagan, Leonard Lynch, and Jim Mattson employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against.

WE WILL within 14 days offer Roger Grizzle full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Don Attaway, Randy Ballantine, Marty Burleson, Hershel Dean Dunagan, Leonard Lynch, Jim Mattson, and Roger Grizzle for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them, less net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Roger Grizzle, and the refusals to hire Don Attaway, Randy Ballantine, Marty Burleson, Hershel Dean Dunagan, Leonard Lynch, and Jim Mattson, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharge and refusals to hire will not be used against them in any way.

LIN ROGERS ELECTRICAL CONTRACTORS, INC.

Elizabeth Kilpatrick, Esq., for the General Counsel.
Richard D. Anderson, Esq., of Topeka, Kansas, for the Respondent.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in Fort Worth, Texas, on April 15 and 16, 1996. The case originated from a charge filed by Local Union No. 59, International Brotherhood of Electrical Workers, AFL–CIO (Local 59) in Case 16–CA–17563 and by Local Union No. 116, International Brotherhood of Electrical Workers, AFL–CIO (Local 116) in Case 16–CA–17563–2. On December 15, 1995, an order consolidating cases, complaint and notice of hearing issued. The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by refusing to consider the employment applications of and refusing to employ certain named individuals because they were identified as union supporters or members or were referred for employment by the Union, and by terminating employee Roger Grizzle because of his support of the Unions.

In its answer to the consolidated complaint, Respondent admitted certain allegations, including the filing and serving of the charges; its status as an employer within the meaning of the Act; the status of the Unions as labor organizations within the meaning of the Act; and the status of Doug Coger as a supervisor of Respondent within the meaning of the Act. Respondent denied the status of Diane Coger as either a supervisor or agent of Respondent within the meaning of the Act, and denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial herein, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following oral argument on April 16, I delivered a bench decision pursuant to Section 102.35 of the Board's Rules and Regulations. In accordance with Section 102.45 thereof, I certify the accuracy of, and attach hereto as "Appendix B," the pertinent portion (pp. 275 through 290) of the trial transcript [errors in the transcript have been noted and corrected]. Other minor errors may occur, but are insignificant.

I have found that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that the Unions are labor organizations within the meaning of the Act; and that Respondent violated the Act in the particulars and for the reasons stated in my oral bench decision. The unfair labor practices which Respondent has been found to have engaged in have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

APPENDIX B

BENCH DECISION

[Cases 16–CA–14814 and 16–CA–17563–2 April 15, 1996]

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[ADMINISTRATIVE LAW] JUDGE [PHILIP P.] MCLEOD: I think we all have recognized from the outset it is well-established that the failure to consider or hire a job applicant because of his or her union membership violates Section 8(a)(1) and (3) of the Act, and the cases deciding this go back as far as 1941, as cited by counsel for General Counsel in *Phelps Dodge versus NLRB* at 313 U.S. 177.

The Board has—and the courts, and in fact, the Supreme Court, have recently considered a series of cases dealing with the subject of refusal or failure to hire, and, in fact, most—recently the Board issued a decision in the *Town & Country* case—*NLRB versus Town & Country Electric*—the Board's decision at 309 NLRB 1250 (1992).

The Supreme Court decision can be found at 150 LRRM 2897. It issued on November 28, 1995. The *Town & Country* decision, by the way, is somewhat similar to the case here in the sense that they were dealing with the question of the applications of full-time union personnel, business agents, and the question of whether or not they were valid applicants for employment.

In the context of an unlawful refusal-to-hire case, the General Counsel must establish the following elements: Number 1, an application for employment by the alleged

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discriminatee; number two, the refusal to hire; number three, a showing that the employer knew of the union applicant's union status or activities; and, four, that the employer refused to hire the union applicants, due to union animus.

As counsel for General Counsel pointed out in her closing argument, the Board does apply a *Wright Line* type of analysis in its failure-to-hire cases. I would cite to you *Big E's Foodland, Inc.,* 242 NLRB 963, a 1979 case in which the Board articulated the refusal-to-hire test.

Using the *Wright Line* analysis and applying it to this case leads me to the following conclusion. First of all, addressing the issue of whether and to what extent Diane Coger was an agent of the Respondent, I find that Diane Coger was an agent of the Respondent for purposes of various actions related to the hiring of employees.

That is not to say I find she is a supervisor within the meaning of the Act; clearly she was not. And clearly she was not an agent of the Respondent for every purpose, but the record reflects that she was an agent of the Respondent for certain purposes related to the hiring of employees.

Specifically, I would rely on the testimony of Diane Coger herself in describing her participation in the hiring process, in the fact that she placed the newspaper

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ads for employees at the particular facility where she worked; her testimony that she, on her own—I don't mean on her own authority—but individually contacted the temporary service with regard to obtaining local electricians.

I note as well the credible testimony of Susan Terry, that when an order was placed for employees with her Western employment services, two individuals were listed as contact people with the Respondent, one being Douglas Coger, who is clearly a supervisor within the meaning of the Act here, and the second person being Diane Coger.

The second finding I make is that at some point in time, the company—the Respondent clearly planned to hire local electricians to do the work at the Lewisville, Texas, Home Depot jobsite. The fact that the Respondent went to the trouble of placing ads in the local paper itself suggests that it was intending to hire local electricians for that purpose.

Further, the credible testimony of Donald Attaway establishes that on July 3, Douglas Coger told him that the job would take approximately 10 to 15 journeyman electricians, the implication being since Attaway was applying for work in that position that Coger was talking about local electricians similar to Attaway.

Thirdly, the credible testimony of Roger Grizzle

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shows that as late as July 19, John Gudger the project manager who had come in from Atlanta told Grizzle—or, excuse me—asked Grizzle if he knew of others like him, and told Grizzle that the company would like to hire more people like him.

Fourthly, the use of the personnel service, Western Temporary—or, excuse me—Western Services, shows that even as late as July, in late July, Respondent was looking for local electricians to perform work, as I am completely satisfied that the record establishes that Respondent planned to use local electricians for the Lewisville project.

At some point, Respondent decided not hire the alleged discriminatees, obviously. Now, in Respondent's closing argument, Mr. Anderson effectively concedes that, in saying that the company had decided it was not going to take any more applications on the jobsite because, as the Respondent contends, other employees were going to become available through other projects.

There is no question at some point the Respondent decided it was not going to hire local people. The question is, Why? That is the issue in the case.

Looking at this from the perspective of assessing counsel for General Counsel's prima facie case, there is absolutely no doubt in my mind she has established that

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the union activities and sentiments of the applicants was a factor in Respondent deciding not to hire local—people for this project.

First of all, I would note the credible testimony of Susan Terry that in late July, Diane Coger told her that Respondent preferred not to interview Leonard Lynch because he was a union leader.

I am fully aware of the fact that that statement is denied by Diane Coger, and I specifically credit Susan Terry with regard to that statement. Susan Terry is a person who was totally disinterested in this proceeding: that is to say she is not an interested party; she has no interest in the outcome; she has no interest in supporting one side or the other.

And it was very clear from her testimony that she was rather upset with both sides by the time the relationship with this particular case was over. She was just as irritated with the union business agents who showed up and in her mind harassed her with regard to trying to get work with the Respondent through her facility as she was with Diane Coger for telling her that the Respondent did not want to interview Leonard Lynch because he was a union leader.

Secondly, I note the credible testimony of Leonard Lynch that when he went to the project on July 6 and spoke

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to Douglas Coger, Douglas Coger specifically told him that the Respondent wanted to keep this project nonunion.

I also note similar credible testimony from Donald Attaway in which he was told by Douglas Coger that the company had decided not to do this job with union labor. Coger went on to make a point that he had nothing against individual union people, but that this was a call that had been made by the Company from its headquarters, not by Mr. Coger.

I note, too, that to a certain extent, the Respondent played games, engaged in somewhat of a subterfuge when it came to the applicants who were union members, in that there came a point, very early, as a matter of fact, where when any of the people applied who were union members, they were told Respondent was too busy to interview them, and they would be called back for an interview and a test, and, of course, never received any later call, for either an interview or a test.

Now, it can be argued this was because either the company had decided not to use local people, which seems to beg the question because that is the ultimate issue in the case, or it can be argued that this did not occur because the Respondent became so busy.

However, I note specifically with regard to that that Grizzle was interviewed one day, and the very next day,

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Ballentine was told that Respondent was too busy to interview or to test him and would call him back. So it is not as if there is very much of a time gap in there.

Moreover, I noticed a pattern with regard to union members being told repeatedly that they would be called back for an interview and test.

Like the testimony of Lynch and Attaway, Roger Grizzle testified credibly. He was told by Douglas Coger that while Rogers was union in some places, it was not going to do this job nonunion.

The fact that the Respondent has some union contracts in other places really helps us very little in analyzing this case, because the issue is what happened here and why. And by Douglas Coger's own comments to employees, this project was somehow different from other projects, in that Respondent had decided it was going to do this project nonunion.

Going also to the question of Respondent's motivation for not hiring union people in assessing counsel for General Counsel's prima facie case, I am very mindful of what I consider to be very credible testimony of Roger Grizzle concerning the incident with Leonard Lynch at Western Staffing.

Not only did we have the testimony of Susan Terry

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with regard to what happened at Western Staffing, but we had very credible testimony from Roger Grizzle that he overhead Diane Coger come out of a trailer at Respondent's facility and say to Douglas Coger, Oh, no. Leonard Lynch is at Western Staffing; he is union; we can't hire him. And Douglas Coger responded, Wow. I can't believe they busted that that quick, or words to that effect.

We then get to the question of why, then, did Respondent decide not to hire local people, and all of the evidence that I have cited tends to suggest that Respondent made that decision because it had decided, as Douglas Coger stated, that this was going to be a nonunion job.

The bringing-in of Respondent's employees from other projects does not suggest a nondiscriminatory action by Respondent, but rather—suggest a plan by Respondent to bring them in precisely to avoid hiring local people.

Now, in assessing the counsel for General Counsel's case with regard to Grizzle, there is really no factual dispute at all between either Grizzle or Douglas Coger. Grizzle testified that on the day he was terminated and the picketing was going on, he was told by Douglas Coger, if you go out there, you are quitting.

After he went out and talked to people on the picket

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line and, in fact, honored the picket line for most of that day, he came in later in the day and told Mr. Coger that he would be back tomorrow morning. According to Grizzle, Mr. Coger told him, Well, you don't have to worry about that; we terminated you.

Douglas Coger's testimony is not only not that different; it is actually stronger in support of counsel for General Counsel's case than is Grizzle's. Coger admits telling Grizzle, If you leave now I am going to have to terminate you.

He admits, as Grizzle testified, that when he came back he told Grizzle that he had, in fact, terminated him. But what really puts the icing on the cake in terms of counsel for General Counsel's prima facie case with regard to Grizzle is Coger specifically testified Grizzle specifically told him the reason he was going out was because he "wanted to honor their picket line."

In a case like that, the law requires that the company treat an individual who leaves work to honor a picket line in the same manner as a striker. It was Repondent's obligation to simply trat Grizzle as a striker. It could, no question, have permanently replaced him, but that is not what it did; it terminated Grizzle.

From the evidence that I have referred to, there is no question in my mind that counsel for General Counsel

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has established a very strong prima facie case that the individuals who applied for work and who indicated on their applications that they were members of the union were not hired by Respondent precisely because of their union affiliation.

The question under *Wright Line* then becomes whether or not the Respondent can establish by sufficient evidence that these people would not have been hired, regardless of the union activity.

In assessing that issue, we tend, then, to look at the issue of Respondent bring in people from other locations, or ultimately we do.

In my assessment of the Respondent's position in this case, I would have to say that there appear to be a few gaping holes in Respondent's theory. First of all, the decision not to hire local people—that is to say the change in its position, its initial movement toward hiring people is really not adequately explained.

By Diane Coger's testimony, Respondent ran an ad in the local paper from, as she put it, early July for two weeks, takes you at least up to July 4, yet both the testimony of Diane Coger and Doug Coger shows that absolutely without question, Respondent started telling potential applicants for work that

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Respondent was no longer taking applications as of July 10.

The clear implication is that that ad may very well still have been running at the time that Respondent made that decision, and if it wasn't, it was incumbent on Respondent to show that, because the testimony of their own witnesses is the testimony I rely on to draw that conclusion.

Secondly, it is significant that the decision not to take any further applications was made on July 10, right at the peak of union applications coming in. Respondent has shown no evidence of anything having occurred on or about July 10 for it to reverse the decision to hire local people and instead bring people in from outside.

Thirdly, Respondent's evidence regarding its practice of moving people from project to project is not adequately explained. Two simple paragraphs in the company handbook do not adequately explain the change in the decision to hire local people at this project on or about July 10.

This is particular true when people from other projects were brought in when those other projects were not even yet complete.

The simple fact is that nothing has been shown to have happened of any unexpected nature to cause a shift in

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the hiring emphasis from local people to bringing in people from other projects.

Any termination of other projects or slowing down of other projects would have already been known to the Respondent, as testified to by Douglas Coger himself.

And last but not least, this decision to supposedly bring people in from other projects and not use local people seems to be belied by the fact that in late July, Respondent was still trying to use or get in contact with possible local people by use of the temporary or employment service.

I conclude, therefore, that the Respondent has not established that the alleged discrinimatees would not have been hired regardless of their union activity or affiliation. I then get to the questions of whether or not the discriminatees in this case do include Dunagan.

The testimony of Dunagan—and, frankly, I found it credible—was that he did apply. The testimony of Ballentine, which I also found credible, was that he saw Dunagan apply.

Diane Coger really doesn't deny that. In fact, she agrees that he probably did fill out an application. She testified that she simply didn't find it after they left. I reallly don't need to discredit her on this issue, and I don't want to discredit people unnecessarily in making a

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decision.

There really is not very much factual dispute. The Respondent's position is, Well, since it didn't have or couldn't find an application for Dunagan, it couldn't very well consider him. But I specifically find that by then, the Respondent had made a decision not to hire local applicants in order to avoid hiring local union people.

That gets to the question of Burleson. Burleson's testimony is really not challenged on a credibility standpoint as to whether or not on July 10, he called and was told by Diane Coger that Respondent was no longer taking applications.

My recollection is and my notes show that Diane Coger testified she didn't recall any call, but if, in fact, she testified that he did not call, I credit Burleson that he did, and I find that, indeed, Burleson on July 10, as everyone else on and after July 10 who did call were told that Respondent was no longer taking applications. It was simple.

One of the issues in this case that was raised in opening remarks and by the parties is whether or not a backpay remedy should fo to union business agents in this case. Obviously, the business agents were employed full-time by the union, and the question is would they have possibly taken jobs with the Respondent even if they had

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been offered them?

I am aware that this is an issue which the Board at some point may have to address. I am by no means in this case suggesting as a matter of law that full-time paid union business agents should automatically get back pay when they are discriminated against. I don't need to make that finding in this case.

In fact, I strongly suspect that that is a decision which is going to have to be addressed by the Board in a case-by-case fashion. And in this case, the evidence absolutely, clearly, unqualifiedly shows that a paid business agent, in fact, worked for the Respondent—Grizzle.

That was developed by counsel for Respondent on cross-examination of Grizzle, that while he worked for Respondent he was a full—he was a paid business agent of the union. Therefore, there is no reason to believe in this case that other business agents of the union would not similarly have taken jobs with the Respondent had they been offered them.

They might very well have been getting paid by two sources at the same time, but that is not of concern to the Board. The Board is concerned with devising a remedy for the discrimination—and I understand Respondent's argument that they should not receive a bonus, and the

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Respondent should not be penalized.

But in this case, the evidence shows that it would not be a penalty; that in fact, there were paid business agents who—or a least one who worked for the Respondent.

I want to address a few of the remarks of the Respondent's counsel in his closing statement, one of which was that the evidence was uncontroverted manning or staffing was essentially done by people from other jobs.

Actually, the record is relatively poorly developed on that point, and it is one of the factors that I take into account in finding the Respondent has not carried the burden—its burden in this case.

If, in fact, the Respondent had some pattern, some longstanding practice of moving people from job to job, I think the evidence should have been much more than was offered in this proceeding, showing the actual practice of the company over the last six months, the last year, over any number of given projects.

All of that information, all of the records tending to establish that are within the custody and control of the Respondent, and all of that could have been placed into the record.

Instead I had simple statements by witnesses that that was done, and where there are records in the

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possession of the Respondent that would tend to prove that, and they are not put into the record.

But instead I simply have oral testimony, I have a real doubt whether or not the record would tend to support that, and to some extent do draw an adverse inference. But more importantly, the record is simply not developed that that pattern truly exists.

ORDER

With regard to the remedy for the violations that I have found, it will be contained in the supplemental decision, which I am required to issue pursuant to the Board's rules and regulations, and briefly I will simply say that it will be the remedy articulated by counsel for General Counsel in her closing statement. It is the traditional remedy in refusal-to-hire cases.

I would note for the parties that pursuant to the Board's rules and regulations, Section 102.45, that if an administrative law judge delivers a bench decision, then promptly upon receiving the transcript, the judge shall certify the accuracy of the pages of the transcript containing the decision, file with Board, a certified copy of those pages, together with any supplementary matter the judge may deem necessary to complete the decision, and cause a copy thereof to be served upon each of the parties.